

_____ ②
No. 87-1833

in the
Supreme Court
of the
United States

October Term, 1987

THE STATE OF FLORIDA,

Petitioner,

vs.

CHARLES SLAPPY,

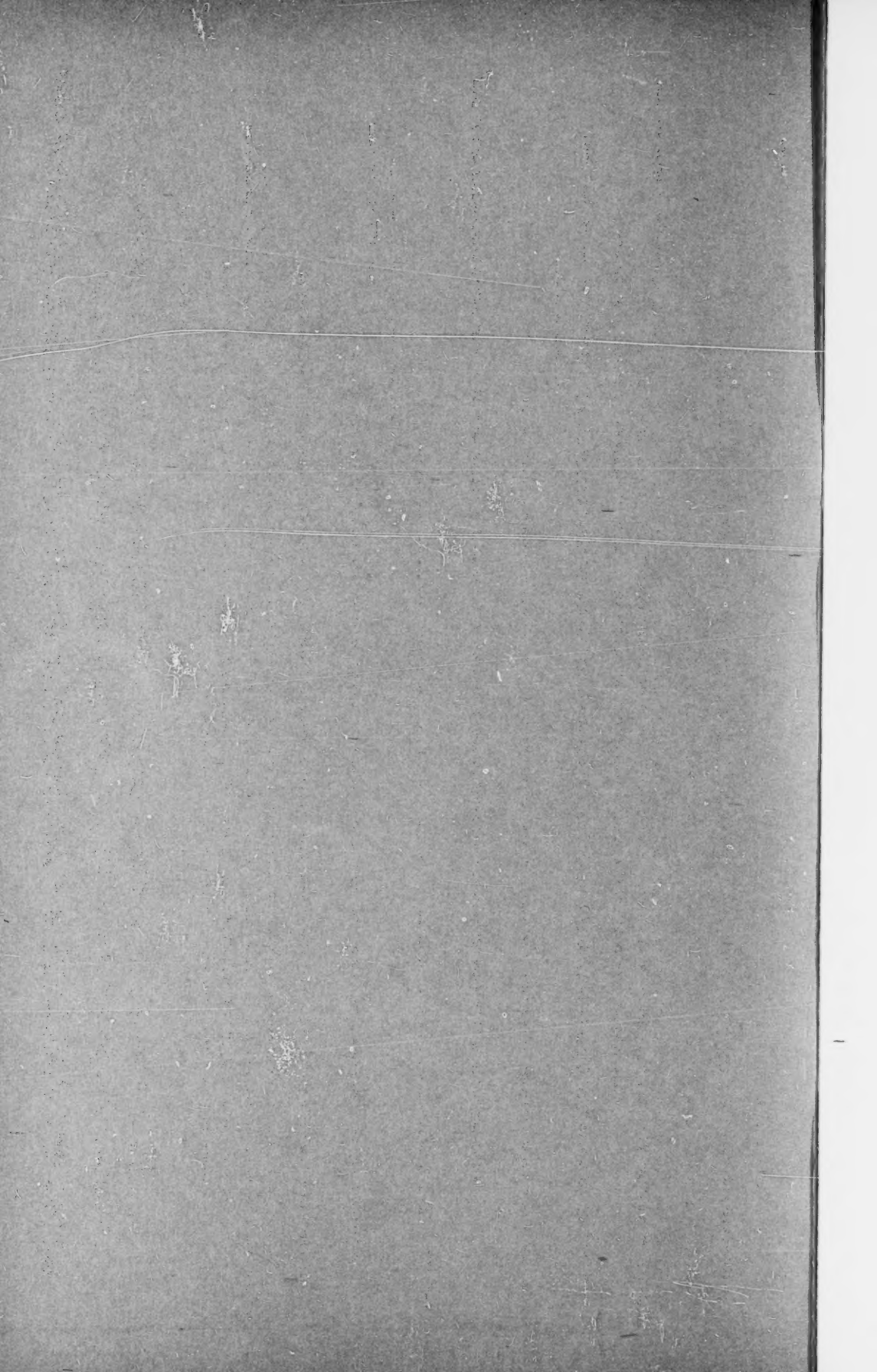
Respondent.

On Petition for a Writ Of Certiorari
To The Supreme Court of Florida

**BRIEF OF RESPONDENT IN
OPPOSITION TO JURISDICTION**

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QUESTIONS PRESENTED

(Restated)

I.

WHETHER THE OPINION OF THE SUPREME COURT OF FLORIDA IS IN CONFLICT WITH *BATSON V. KENTUCKY*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.ED. 2d 69 (1986) WHERE IT HELD THAT IN ADDITION TO GIVING REASONABLE, RACE-NEUTRAL REASONS FOR THE EXERCISE OF A PEREMPTORY CHALLENGE, THERE IS ALSO A BURDEN PLACED UPON THE CHALLENGED PARTY TO ESTABLISH WITH APPROPRIATE RECORD SUPPORT, THAT THE PROFFERED REASONS ARE NOT A MERE PRETEXT?

II.

WHETHER THE OPINION OF THE SUPREME COURT OF FLORIDA RESTS ON ADEQUATE AND INDEPENDENT STATE GROUND, TO WIT: ARTICLE 1, SECTION 16, OF THE CONSTITUTION OF FLORIDA?

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STATEMENT OF THE CASE

No further statement of the case is necessary, pursuant to Rule 34.2.

- SUMMARY OF THE ARGUMENT

The Petitioner, The State of Florida, erroneously asserts that the decision of the Supreme Court of Florida in *State v. Slappy*, ____ So. 2d ____, 19 FLW 134 (Fla. March 10, 1988), is in conflict with this Court's decision in *Batson v. Kentucky*, 476 U.S. 79, 106 S. Ct. 1712, 90 L.Ed. 2d, 69 (1986), where said decision did no more than establish the appropriate test to be employed by trial courts in determining the legitimacy of proffered racially-neutral reasons.

Respondent further urges that jurisdiction is inappropriate as the judgment of the Supreme Court of Florida rests on independent State grounds indicated by a plain statement to that effect in the opinion.

REASONS FOR DENYING CERTIORARI

PROPOSITION I

The opinion of the Supreme Court of Florida is not in conflict with *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed. 69 (1986), where the Supreme Court of Florida held that the prosecution had failed to meet its burden to show that the proffered race-neutral reasons were not pretextual and supported by the record.

This Court held in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986), as the Petitioner points out, that once the prosecutor has articulated a neutral explanation related to the particular case to be tried, "The trial court will then have the duty to determine if the defendant has established purposeful discrimination." It certainly was not the intent of this Court that any race-neutral reason will suffice, nor that the aggrieved party would not be able to avail himself of appellate review of proffered race-neutral reasons which the aggrieved party felt were insufficient to satisfy the burden imposed.

In fact, this Court specifically passed the torch to the various jurisdictions to formulate the particular procedures to be followed. *Batson v. Kentucky*, 106 S.Ct. 1712, 1724 (1986). Further, in an elaboration of this statement at Footnote 24, this Court says:

In light of the variety of jury selection practices followed in our state and federal trial courts, we make no attempt to instruct those court how best to implement our holding today.

The aforesaid Footnote continues to also state that the Court does not seek to even fashion the appropriate remedy, but rather similarly leaves that issue to the various trial courts involved.

In his concurring opinion to this Court's decision in *Batson v. Kentucky*, *supra.*, Justice Marshall notes:

Any prosecutor can easily assert racially-neutral reasons for striking a juror. . . If such easily-generated explanations are sufficient to discharge the prosecutor's obligation to justify his strikes on non-racial grounds, then the protection erected by the Court today may be illusory.

Certainly it is beyond question that this Court did not mean its decision to be illusory, and pursuant to the dictates of this Court, the Supreme Court of Florida has imposed upon the trial courts of that State a procedure and test to be employed by the various trial judges in that State to assure as much as humanly possible that no litigant be deprived of a jury composed of a true representative cross-section of his community and that no person be denied his participation in the justice system of the United States of America because of the color of his skin.

The decision of the Supreme Court of Florida not only is *not* in conflict with this Court's decision in *Batson v. Kentucky*, *supra*, but further, is fully consistent and complementary with both its letter and spirit.

PROPOSITION II

The decision of the State of Florida rests upon independent and adequate non-federal grounds to support the judgment.

For jurisdiction to be appropriate in this Court, based upon certiorari review of the decision of a state tribunal, jurisdiction is inappropriate if the challenged decision is based upon independent and adequate non

federal grounds. *Henry v. Mississippi*, 379 U.S. 443, 89 S.Ct. 564 (1965); *Jankovich v. Indiana Toll Road Commission*, 379 U.S. 487, 85 S.Ct. 493 (1965); *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed. 2d 1201 (1983).

The case of *Batson v. Kentucky*, *supra*, was argued before this Court on December 12, 1985, and decided on April 30, 1986. Over one year before that the Supreme Court of Florida decided the case of *State v. Neil*, 457 So.2d 481 (Fla. 1984). In its opinion, the Supreme Court of Florida specifically notes that the appropriate federal law on this question at that time was governed by *Swain v. Alabama*, 380 U.S. 202, 85 S.Ct. 824, 13 L.Ed.2d 759 (1965). The Florida court goes on to state in support of its conclusion that *Swain v. Alabama*, *supra*, was the appropriate federal standard, that this Court had then recently denied certiorari in a case attacking *Swain v. Alabama*; i.e., *McCray v. New York*, ____ U.S. ____, 103 S.Ct. 2438, 77 L.Ed. 2d 1322 (1983). For that reason the decision was specifically and unambiguously decided on the basis of Article 1, Section 16 of the Florida Constitution. *State v. Neil*, *supra* at 486, 487 n.12. In fact, it was not until the pendency of these proceedings in the District Court of Appeal of Florida Third District that this Court's decision in *Batson v. Kentucky*, *supra*, was decided. *Slappy v. State*, 503 So.2d 350, 353 (Fla. 3d DCA 1987).

Though clearly the Supreme Court of Florida discussed principles contained in this Court's decision in *Batson v. Kentucky*, *supra*, other federal decisions in addition to numerous other decisions of the State courts of Florida, the State courts of Illinois, the State courts of Massachusetts and the State courts of California, it

made clear by repeated plain statements that this decision rested firmly on the guarantees contained in Article 1, Section 16 of the Constitution of the State of Florida, an alternative, bona fide, separate, adequate and independent State ground.

The proof of this is found in the Appendix to the Petitioner's Brief wherein the challenged opinion of the Supreme Court of Florida has been reproduced:

In interpreting our *own Constitution*, this court in *State v. Neil*, 457 So. 2d 481 (Fla. 1984), clarified *sub non State v. Castillo*, 486 So. 2d 565 (1986), recognized the protection against improper bias in the selection of juries that proceeded, foreshadowed, and exceeds the current federal guarantees. We today, affirm this State's continuing commitment to a vigorously impartial system of selecting jurors *based on the Florida Constitution's explicit guarantee of an impartial trial. See Art. I, §16, Fla. Const.*

(Emphasis supplied.) (A-39-40)

At A-51 of the Petitioner's Appendix, the Supreme Court of Florida in its opinion again states:

The Third District reached a result in harmony with *Batson, Neil* and *Article 1, Section 16 of the Florida Constitution*.

(Emphasis supplied.)

And lastly, the Supreme Court of Florida states in the very last sentence of its opinion (A-57):

This result is consistent with *Neil*, where we found error even though a Black served as an alternate juror.

457 So. 2d at 483. As previously stated and as the opinion clearly indicates, *Neil* is based *solely* on Article 1, Section 16 of the Constitution of the State of Florida.

In *Michigan v. Long*, 463 U.S. 1032, 103 S.Ct. 3469, 77 L.Ed. 2d 1201 (1983), this Court held that jurisdiction in this Court does not attach merely because a state court relies upon federal precedents as it would on the precedents of any other jurisdiction. And if such be the case, it need only make clear by a plain statement in its judgment or opinion that the federal cases are being used only for that purpose, and that they do not compel the result that the court has reached.

In the case at bar, the Supreme Court of Florida does clearly state that it believes that its opinion is consistent with this Court's opinion in *Batson v. Kentucky*, *supra*. Clearly this is a belief shared by your Respondent. However, even if this Court were to disagree with that dicta, jurisdiction still would not be appropriate as the Supreme Court of Florida clearly and expressly states that the result contained in *State v. Slappy* is required by Article 1, Section 16, of the Florida Constitution and that therefore the result is not dictated by the Supreme Court of Florida's opinion of the requirement of federal law, but rather by the Supreme Court of Florida's interpretation of this State's own Constitution and the

dictates of that court's decision in *State v. Neil, supra*, a case which preceded *Batson v. Kentucky, supra*.

Therefore, as it clearly appears that the Supreme Court of Florida did not rest its decision primarily on federal law, but rather based upon its "plain statement that the decision below rested on an adequate, and independent state ground", jurisdiction is inappropriate. *Michigan v. Long, supra*.

CONCLUSION

WHEREFORE, based upon the absence of any conflict with this Court's decision in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L. Ed 2nd 69 (1986) and the fact that the opinion of the Supreme Court of Florida rests upon adequate and independent state grounds, it is respectfully submitted that this Honorable Court ought deny certiorari jurisdiction.

Respectfully submitted,

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